c. *Assumption of Risk.*

During the last few years the non-liability of a charitable hospital to its patients has been explained upon the theory that the beneficiaries, including pay as well as free patients, assume the risk of any injury incurred through the negligence of the hospital's servants if due care has been used in their selection. This doctrine is followed in the Federal,[36] Michigan,[37] and New York[38] courts and has been at least suggested in England.[39] It seems in the main to be a satisfactory ground of decision.

d. *Limited Undertaking.*

Another doctrine, which is at least plausible, was the basis of the opinion of Kennedy, L. J., in the recent case of *Hillyer* v. *Mayor, etc.*[40] Under it the exemption of a hospital from liability for the negligence of its servants is based on the theory that a hospital undertakes merely to use due care in the selection of its servants and to furnish proper appliances.

Under either of the last two theories the patient could, of course, recover if he could establish a contract which the hospital had broken.[41]

Institutions of public charity are daily becoming more numerous, and the problems connected with their liability are, therefore, of increasing importance. How far public policy will in the future demand their exemption from liability is of course problematical, but the development of the law indicates that the required exemption will at no distant date be placed upon firmer and more satisfactory foundations than any trust fund theory can supply.

H. E.

Right of Surety to Exoneration.

The right of the surety to maintain a bill in equity against the principal debtor after the obligation becomes payable, and exonerate himself from further liability, has been recognized

[36] *Powers* v. *Hospital,* 109 Fed. 294 (1901).

[37] *Bruce* v. *Church,* 147 Mich. 230 (1907).

[38] *Kellogg Church Foundation,* 112 N. Y. S. 566 (App. Div.) (1908).

[39] *Tozeland* v. *Guardians,* L. R. (1907) 1 K. B. 920. See 47 Am. Law Reg. N. S. 124.

[40] 101 L. T. 368 (1909).

[41] *Ward* v. *Hospital,* 79 N. Y. S. 1004 (App. Div.) (1903).

from early times; and this is true, notwithstanding the surety has not paid the debt, and whether he has been sued by the creditor or not. This is in the nature of a bill *quia timet* to *compel* the principal debtor to pay the debt and perform the obligation, provided the creditor can enforce payment or performance, but neglects or refuses to do so. The creditor must, however, be joined as co-defendant.

This principle is illustrated by a recent case, *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*[1] The plaintiff's intestate had become surety for a limited amount against the defendant's overdrafts, for a period of time determinable upon notice. Upon the death of the surety, his executor, the present plaintiff, desiring to wind up the estate, requested the defendants to discharge him from liability upon an overdraft of 17219l., and upon their refusal, brought this suit. Plaintiff claimed the right to be discharged and exonerated from all liability under the guarantee, by compelling the defendants to pay the bank the amount of the overdraft. It was contended that until the guarantee had been determined, and the overdraft called in, no right of action accrued to the bank against the surety; but the Court was of opinion that this was unsound. Repayment of the overdraft could be enforced by the bank at any time, as the contract did not compel the bank to allow overdrafts. Since, therefore, the bank has a present right of action against the surety, the latter may come into equity to compel the principal debtor to pay what is due from him, to the intent that the surety may be relieved, and it was so decreed.

To the same effect is the case of *Holcomb* v. *Fetter*[2] where payment was decreed by the principal debtor, at the instance of the surety, notwithstanding that it did not appear that the principal debtor was insolvent or in danger of becoming so; the Court holding that the jurisdiction does not rest upon this ground. It was further argued that if the creditor should sleep upon his rights and fail to bring action, such laches would be a good defense to an action against the surety for contribution. But the creditor is not barred by laches alone; and further, the cases rest upon the principle that there is a debt due which it is the duty of the principal debtor, in exoneration of his surety, to pay forthwith. The bill is one of *quia timet*. The plaintiff has a present right to exoneration because the debt is due.[3]

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[1] Ct. of App. 1909, L. R. 2 Ch. 401.

[2] 67 Atl. Rep. 1078 (N. J.).

[3] See also *Frick* v. *Black*, 17 N. J. Eq. 189; *West* v. *Chasten*, 12 Fla.

At law, the surety must pay the debt before he can have an action against his principal;[4] and grave doubts were for a long time entertained as to the right of the surety to call upon the creditor to prosecute his demand against the principal debtor. It was deemed an interference with the legal rights of the creditor, for he may have looked more to the surety than to the actual debtor, resting content under the doctrine that it is the surety's business to see whether the principal pays, and not that of the creditor. Consequently, the surety could impose no burden upon the creditor by notifying him to proceed against the principal, and this was the rule in most jurisdictions at the common law.

In most States by statute, however, the surety may require the creditor by written notice to bring suit against the principal; and upon the creditor's refusal or failure to comply with such notice, the surety is released, unless the principal was insolvent at the time notice was given, or becomes insolvent before the creditor can collect by process;[5] and the burden is on the creditors to show that action would have been unavailing. But independently of statute, the surety might get a decree in chancery that the creditor sue or take out execution against the principal for good cause shown; it being unreasonable that a man should have such a cloud always hanging over him; but this action is limited, generally, to cases where it works no hardship upon the creditor, and would work a hardship upon the surety if the creditor were to proceed directly against the surety.[6]

In Pennsylvania, however, *notice* has been substituted for the *decree* in chancery; but the notice must be as explicit as a decree that the creditor sue or execute the principal;[7] and where the surety had notified the plaintiff to proceed and "collect his money, as he would be bail no longer," and later extended the time to a specified day, and the creditor did not issue process, and the principal debtor, six days after the expiration of the extended time, assigned all his property for the benefit of creditors, the surety was not discharged, because there was not that explicit direction to proceed that the law

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315; *Graham* v. *Thornton*, 9 South (Miss.) 292 (1891); *Stump* v. *Rogers*, 1 Ohio 533; *Bishop* v. *Day*, 13 Vt. 81; *Dobio* v. *Fidelity & Casualty Co.*, 95 Wis. 540; *Craighead* v. *Swartz*, 219 Pa. 149.

[4] *Bishop* v. *Day*, 13 Vt. 81.

[5] 85 Ill. 22; 9 Ind. 245; 6 Iowa, 538; 76 Mo. 70.

[6] *Marsh* v. *Pike*, 10 Paige, 595 (N. Y.); *Dobio* v. *Fidelity Co.*, 95 Wis. 540; *City of Keokuk* v. *Love*, 31 Ia. 119.

[7] *Cope* v. *Smith*, 8 S. & R. 115; *Greenawalt* v. *Kreider*, 3 Barr. 267.

required in order to relieve him from liability; nor will a mere notice by the surety to the creditor that he would no longer consider himself bound, and requesting him to take another bond or payment, absolve the surety.[8]

G. H. B.

CARRIERS—CAR DISTRIBUTION—COMPANY FUEL CARS.

As a common carrier, a railroad is required to furnish all facilities necessary for transportation, including cars, a supply of which must be afforded sufficient to accommodate the traffic offered. It is not incumbent, however, upon a railroad to furnish sufficient specialized cars to meet the demand therefor at all times. Such cars must necessarily remain idle except when required by the traffic to which they are particularly adapted, and for that reason a railroad is held to have discharged its obligation by furnishing enough of such cars to meet the average demand.[1] Coal cars are suited only to the transportation of coal, and are, therefore, within this rule. As the output of bituminous coal fluctuates in a marked degree, as a result of the varying demand for that commodity, and as the lack of storage facilities at the mine makes it imperative that the coal be taken by the carrier at the mouth of the mine, it follows that at certain periods it is impossible for the carrier to supply all shippers with a sufficient number of cars to enable them to meet the market demand for coal. In such periods it is the duty of the carrier to pro-rate the available cars among all shippers in a particular district, so that none will be put at a disadvantage as regards his competitors.[2]

In order to arrive at a fair and just distribution of available cars, it is necessary, first, that the capacity of each mine in the district under consideration be ascertained, and, second, that an equitable scheme for the allotment of cars in shortage periods, in proportion to the capacities of the mines, be fixed upon. The question of determining the capacity of a mine is not strictly a judicial one, and it is not within the scope of the present note to discuss the various schemes for ascertaining capacity that have been passed upon by the courts. Suffice it to give the following statement by Judge Goff of the factors that

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[8] *Greenawalt* v. *Kreider,* 3 Barr. 264.

[1] U. S. *ex rel. Pitcairn Coal Co.* v. *B. & O. R. Co.,* 165 Fed. 113, 119, (reversed on a question of jurisdiction by the United States Supreme Court, Jan. 10, 1910).

[2] § 3, Act to Regulate Commerce, as amended by Act of June 29, 1906, 34 Statutes at Large, 584.